

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JAMES J. WOOD JR.**  
Claimant

VS.

**BRUMBACK & ATKINSON CONST.**  
Respondent

AND

**RELIANCE NATIONAL INSURANCE CO.<sup>1</sup>**  
Insurance Carrier

Docket No. **259,161**

**ORDER**

Respondent, its insolvent insurance carrier, and the Kansas Insurance Guaranty Association (respondent) request review of the November 29, 2012, Post Award Order for Medical Treatment by Administrative Law Judge (ALJ) Brad E. Avery. The case has been placed on the summary docket for disposition without oral argument.

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Kirby A. Vernon of Wichita, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The Board has considered the transcript of the August 24, 2012 hearing on claimant's application for post award medical; the October 17, 2012, deposition of James J. Wood, Jr., with exhibits; the November 2, 2012, deposition of Claudia Renegar, with exhibits; and all pleadings in the administrative file.

**ISSUES**

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<sup>1</sup> Reliance National Insurance Company apparently was liquidated or sought protection under the United States Bankruptcy Code. The Kansas Insurance Guaranty Association, a/k/a Western Guaranty Fund Services, assumed the liability of Reliance in this claim.

The ALJ found claimant was entitled to medical compensation and entered an Order finding in claimant's favor on his application for post-award medical.

Respondent claims the ALJ erred in entering the Post Award Order without considering the November 2, 2012, deposition of Claudia Renegar. Respondent also challenges the substance of the ALJ's Post Award Order for medical treatment, specifically regarding claimant's procurement of authorized prescription medication. Respondent urges the Board to reverse the ALJ's Order.

Claimant argues the ALJ's Post Award Order should be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record detailed above, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

Claimant sustained personal injury by accident arising out of and in the course of his employment with respondent on March 2, 1999. Claimant concluded that claim by settlement hearing before SALJ John C. Nodgaard on May 18, 2009. The settlement left open claimant's rights to future medical treatment and review and modification upon proper application to the Director or by agreement of the parties.

Claimant previously lived in Pittsburg, Kansas, but since March 5, 2005, he has resided in Hawaii. Respondent arranged for authorized treatment in Hawaii and for a period of years claimant had no difficulty securing the medications prescribed by the authorized physician. However, in approximately March 2012, claimant began to encounter difficulties filling the prescriptions he received from the authorized doctor. As a result, pursuant to K.S.A. 44-510k, claimant filed an application for post award medical on June 18, 2012, seeking "[o]ngoing medical care and prescriptions."

A hearing was conducted on claimant's application for post award medical before Judge Avery on August 24, 2012. No evidence was presented at the hearing. The ALJ set terminal dates for claimant on October 23, 2012, and for respondent on November 26, 2012.<sup>2</sup>

The deposition of claimant was taken in Honolulu on October 17, 2012. The transcript of claimant's deposition was filed with the ALJ on November 1, 2012. On October 19, 2012, the ALJ received from respondent's counsel a Notice To Take Evidentiary Deposition of Claudia Renegar in Denver, Colorado, at the offices of Western Guaranty Fund Services, on Friday, November 2, 2012, at 2:30 p.m. The deposition was

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<sup>2</sup> P.A.H. Trans. (Aug. 24, 2012) at 4.

taken as scheduled. Both counsel of record appeared, the witness provided sworn testimony on direct and cross-examination, and exhibits were offered into evidence without objection.

Respondent's terminal date expired on November 26, 2012. Three days after the expiration of respondent's terminal date, on November 29, 2012, the ALJ issued the Post Award Order for Medical Treatment. It was clear from the ALJ's Order that the transcript of Ms. Renegar's deposition had not been considered in arriving at his decision. The submission letter of claimant, filed with the ALJ on November 30, 2012, listed Ms. Renegar's deposition as part of the evidence submitted in the claim.

On November 29, 2012, (both counsel apparently received the ALJ's Order by email on November 29), respondent's counsel emailed Judge Avery noting the deposition of Ms. Renegar was not considered by the ALJ. Respondent's counsel asked the ALJ if it would be necessary to file a motion for reconsideration or a motion for an order nunc pro tunc.

On November 30, 2012, the ALJ emailed respondent's counsel indicating he had no authority to reconsider the record once the award is issued. The ALJ also stated he lacked authority to make substantive changes by nunc pro tunc order. The ALJ quoted K.S.A. 44-552(c) and speculated as follows:

The director or administrative law judge, whoever is conducting the hearing, may make findings, awards, decisions, rulings or modifications of findings or awards and do all acts at any time without awaiting the transcription of the testimony of the certified shorthand reporter if the director or administrative law judge deems it expedient and advisable to do so.

The terminal date in this case was 11/26/12. Apparently, no one directed a copy of the transcript to me because we never received it and we still don't have it.

The ALJ received from respondent's counsel the original of Ms. Renegar's deposition on December 3, 2012.

Respondent filed a timely application for review by the board on December 7, 2012.

The deposition of Ms. Renegar was taken in Denver, Colorado. The court reporter was located in Denver. According to respondent's counsel and contrary to the ALJ's conjecture, the reporter was specifically instructed by respondent's counsel to provide the original of the deposition transcript to Judge Avery. However, the court reporter mistakenly attached the original transcript to the copy sent to respondent's counsel. Respondent's counsel reasonably assumed the court reporter had complied with his instructions.

According to respondent's attorney, he did not realize the original of the transcript had been mistakenly sent to him as an attachment to the copy he received until he

received the ALJ's decision on November 29, 2012. The Board has no reason to doubt the statements of counsel for respondent on this issue. Claimant's counsel does not dispute the representations of respondent's counsel.

Under the circumstances of this claim, the Board has no quarrel with the ALJ's conclusions regarding his lack of authority to issue an amended award, or to enter a nunc pro tunc order which makes substantive changes—as opposed to correcting clerical errors. However, the Board finds there are factors it must consider beyond an isolated reading of K.S.A. 44-552(c). The Board is troubled whenever evidence has been properly taken by a party but is not considered by the ALJ in making a decision.

K.S.A. 44-510k(a) provides in relevant part:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

K.S.A. 44-523 provides in relevant part:

(a) The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

(c) When all parties have submitted the case to an administrative law judge for an award, the administrative law judge shall issue an award within 30 days. The administrative law judge shall not stay a decision due to the absence of a submission letter.

K.A.R. 51-3-5 provides in part:

If there is a dispute between the employer and the worker as to the compensation due and hearings are held before the administrative law judge for a

determination of the issues, upon completion of submission of its evidence, each party shall write to the administrative law judge a letter submitting the case for decision. The administrative law judge shall not stay a decision due to the absence of a submission letter filed in a timely manner.

The ALJ cannot be faulted for issuing a decision based on the evidence filed by the expiration of respondent's terminal date and in the absence of a submission letter from either party. However, in the unusual circumstances of this claim, the Board finds the better practice would have been for the ALJ, or his legal assistant, to simply call or email the attorneys and thereby ensure there was no additional evidence to be considered. The simple step of checking with counsel, or their staff members, would have resulted in no significant delay on the issuance of the Post Award Order.

Before the ALJ entered his Order, the ALJ knew there was a disputed issue regarding medical treatment. The ALJ realized from the August 24, 2012, hearing that, since no evidence was presented at the hearing, all evidence would likely be submitted by evidentiary deposition or written stipulation. The ALJ knew on October 19th that a notice of Ms. Renegar's deposition was to taken on behalf of respondent on November 2, 2012, in Denver, Colorado, although for all the ALJ knew, respondent might have canceled the deposition or decided not to present evidence on behalf of respondent. Those potential occurrences were possible, but improbable.

Ms. Renegar's deposition was taken well within respondent's terminal date and the Board finds it is part of the evidentiary record.

The Board finds the interests of justice require that the ALJ's Post Award Order for Medical Treatment must be vacated and the claim remanded with directions for the ALJ to consider the deposition of Ms. Renegar, along with the other evidence presented in support of, and in opposition to, claimant's application for post award medical treatment, and then enter another Order based on all of the evidence.<sup>3</sup> The Board came to the same conclusion in *Monteleone*,<sup>4</sup> a claim comparable to this claim.

Accordingly, the November 29, 2012, Post Award Order for Medical Treatment entered by ALJ Brad E. Avery is vacated and the claim is remanded with directions to proceed in a manner consistent with this Order. The Board will not rule at this time on the substantive issues raised by respondent. The Board does not retain jurisdiction of this claim.

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<sup>3</sup> Pursuant to K.S.A. 44-551(i)(1), the Board has authority to remand any matter to the administrative law judge for further proceedings.

<sup>4</sup> *Monteleone v. Hy-Vee Food Stores, Inc.*, Nos. 1,004,974 & 1,016,044, 2007 WL 4296008 (Kan. WCAB Nov. 30, 2007) (ALJ issued award without considering a deposition which was taken within terminal dates but the transcript had not been filed when the award was issued).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>5</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Post Award Order for Medical Treatment of Administrative Law Judge Brad E. Avery dated November 29, 2012, is vacated and the claim remanded with directions to proceed consistent with this Order.

**IT IS SO ORDERED.**

Dated this 30th day of April, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Brad E. Avery, ALJ

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<sup>5</sup> K.S.A. 44-555c(k).